Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications	)	WC Docket 05-342
Inc. For Forbearance Under 47 U.S.C. §	)	
160 From Enforcement of Certain of the	)	
Commission's Cost Assignment Rules.	)	

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA")[1] offers this reply to the comments filed with the Federal Communications Commission ("Commission") in this docket on January 23, 2006.[2] Comments were filed by New Jersey Division of the Ratepayer Advocate ("NJDRA"), AT&T Inc. ("AT&T"), Verizon, Time Warner Telecom ("Time Warner"), and Ad Hoc Telecommunications Users Committee ("Ad Hoc").

In its Petition for Forbearance, filed on December 6, 2005 ("Petition"), BellSouth

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[1] NASUCA is a voluntary, national association of 45 consumer advocates in 42 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[2] The comments were filed in response to a Public Notice, DA 05-3185, released on December 22, 2005.

Telecommunications, Inc. ("BellSouth") "requests that the Commission advance the public interest by granting forbearance from its cost assignment rules."[3] BellSouth states that the Commission's cost assignment rules "stand in the way of technological innovation, efficiency and competitiveness by maintaining a rigid regulatory barrier between 'regulated' and 'nonregulated' services that technology and consumers no longer recognize."[4] BellSouth states that it is regulated both at the federal and the state level with price cap mechanisms; therefore, cost allocations are no longer necessary. In other words, according to BellSouth, "under price cap regulation, the costs derived from the Commission's cost assignment rules have no bearing on whether rates are 'just and reasonable.'"[5]

In these reply comments, NASUCA responds to the comments of AT&T and Verizon. Whereas AT&T supports BellSouth's Petition for all price cap incumbent local exchange carriers ("ILECs"),[6] Verizon only supports the Petition for BellSouth, and not for itself.[7] NASUCA also indicates its support for various recommendations and comments made by NJDRA, Time Warner, and Ad Hoc.

II. THE COST ASSIGNMENT RULES AT ISSUE IN BELLSOUTH'S PETITION SHOULD BE REFERRED TO A FEDERAL-STATE JOINT BOARD.

NASUCA agrees with the recommendation of NJDRA (at 3-4) to refer the issues raised in BellSouth's Petition to a federal-state joint board. As stated by NJDRA, given the complexity of the issues and the impact on both federal and state regulators' ability to regulate, a review and

[3] Petition at 1.

[4] Id. at 2.

[5] Id. at 3.

[6] AT&T at 7.

[7] Verizon at 2.

analysis of these issues by both federal and state regulators is necessary.[8] The proposals of the joint board should then be issued for comment by all interested parties.

NJDRA also points out that there are several federal-state joint boards in existence that could perform the detailed analysis required of the issues raised in the Petition. NJDRA mentions the Federal-State Joint Conference on Accounting Issues, the Federal-State Joint Board on Separations and also raises the possibility of a new specially formed Federal-State Joint Board on Cost Allocations.[9]

NASUCA also agrees with NJDRA that the telecommunications industry has changed in terms of technology, new services, and the way consumers use the network. In fact, NJDRA points out that "[i]f a fair share of the common network were allocated to the interstate jurisdiction, based on decisions such as the treatment of DSL and broadband services, state costs would decline and state rate caps should similarly decline."[10] Given this possibility, it is important that these issues are resolved.

Verizon recommends extending the separations freeze which was imposed in 2001.[11] Verizon refers to the United States Telecom Association White Paper,[12] which recommends an interim extension of the separations freeze concurrent with the adoption by the Commission of a Notice of Proposed Rulemaking to address separations reform.[13] NASUCA's and NJDRA's recommendation to refer these issues to a joint board is more appropriate, because these issues

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[8] NJDRA at 4.

[9] Id. at 3-4.

[10] Id. at 10.

[11] Verizon at 1-2.

[12] United States Telecom Association White Paper, Paving the Way for Separations Reform, CC Docket No. 80-286 (filed Dec. 13, 2005).

[13] Verizon at 3.

impact both the interstate and intrastate jurisdictions and joint boards include regulators and staff from both jurisdictions.

Verizon cites to proceedings in Maine and Vermont where the regulators have ordered that "Verizon must reallocate major portions of its network investment to the interstate private line category."[14] It is obvious that a coordinated federal-state effort is needed in order to give separations reform the proper perspective from both jurisdictions.

If the Commission grants Verizon's request for a continuation of the separations freeze, the Commission should concurrently refer separations reform to a federal-state joint board to expeditiously examine all cost allocation rules. A freeze for another five years, however, is not in the best interest of carriers or consumers.

III. THE FORBEARANCE STATUTE'S THREE-PART TEST

As referenced in BellSouth's Petition and in several of the comments filed,[15] 47 U.S.C. § 160(a) includes a three-part test that determines whether the Commission shall forbear from applying any regulation or provision of the Telecommunications Act of 1996 ("Act") to a telecommunications service or carrier. The statute requires forbearance if the Commission determines:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

[14] Id. at 5.

[15] Petition at 8; AT&T at 2-3; NJDRA at 5; Time Warner at 3-4; Ad Hoc at 3.

(3) forbearance from applying such provision or regulation is consistent with the public interest.[16]

AT&T addresses each of the three parts of the test in its comments. However, AT&T does not provide any persuasive demonstration that all elements of the test have been met such that BellSouth and other ILECs should be relieved from the Commission's cost assignment rules. AT&T's are no more persuasive than the arguments BellSouth included in its Petition. Both merely make various unsupported claims that the separation rules at issue prevent innovation and are unnecessary due to price cap regulation. On the other hand, NJDRA, Time Warner and Ad Hoc demonstrate many reasons why BellSouth does not pass the test and why its Petition should not be approved. NASUCA agrees with NJDRA, Time Warner and Ad Hoc.

A. Price Caps Do Not Ensure That Rates Are Just, Reasonable and Nondiscriminatory.

AT&T supports BellSouth's claim that the Commission does not need to enforce its cost assignment rules in order to ensure that rates are just, reasonable and nondiscriminatory.[17] According to AT&T and BellSouth, cost assignment rules were needed for setting rates in a rate-of-return environment, whereas, under price cap mechanisms, rates are based entirely on a price cap formula, which takes into account inflation and other non-accounting factors such as changes in demand.[18] Thus, AT&T concludes, costs are of no use in a price cap environment because the mere existence of price caps ensures that rates are just, reasonable and nondiscriminatory.[19]

Contrary to AT&T's assertions, costs are still a necessary determinant of just and reasonable rates, even under price caps. As is pointed out by NJDRA, regulatory agencies may

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[16] 47 U.S.C. § 160(a).

[17] See AT&T at 3.

[18] See Petition at 2-3; AT&T at 3-4.

[19] AT&T at 3.

review and/or modify price cap plans.[20] Such reviews would require cost information such as the Commission's rules require, in order to determine the continued reasonableness of the price caps. For example, Time Warner discusses the Commission's reliance on cost data in the CALLS proceeding to adjust the price cap indices for several service baskets.[21] In fact, in WC Docket 05-25, the Commission is currently reviewing the price cap mechanism for interstate special access.[22] Some price cap mechanisms also still include exogenous factors, which can only be reflected by using costs recorded pursuant to the Commission's accounting rules. Periodic reviews and adjustments would be rendered meaningless without cost information to assess the appropriateness of the price cap mechanism. Such periodic reviews are simply responsible ratemaking by any regulatory agency.

AT&T also does not recognize that ILECs are still dominant in many markets, especially the market for local residential service and in the bottleneck access services market. However, both NJDRA and Time Warner discuss the continued market dominance of ILECs.[23] The existence of market dominance is reason to guard against anticompetitive behavior. One way to detect such behavior is to analyze costs to determine whether predatory pricing is being practiced. Without following the cost assignment rules, predatory pricing could not be detected. Although price caps, in theory, are supposed to ensure just and reasonable rates, this assumes a robust competitive marketplace exists. However, robust competition does not exist throughout the telecommunications marketplace, especially for many local services, and certainly not for

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[20] NJDRA at 8.

[21] See Time Warner at 8-9.

[22] *Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM-10593, Order and Notice of Proposed Rulemaking, FCC 05-18 (rel. January 31, 2005). See Ad Hoc at 4-10; NJDRA at 3; Time Warner at 9-10.

[23] See NJDRA at 5; Time Warner at 1-2.

special access services. Given this, the Commission must continue to operate as a "check" on the marketplace.

Neither AT&T nor BellSouth mention, as Time Warner does, that TELRIC rates are still determined using actual cost data from Class A accounting and ARMIS reporting for input into forward looking cost models and that the Commission's Synthesis Model also uses cost data to simulate forward looking costs for universal service support purposes.[24]

For these reasons, price caps -- without separating regulated and unregulated and interstate and intrastate costs -- are not adequate to ensure just, reasonable and nondiscriminatory rates as the law requires. BellSouth's petition should be denied.

B. Cost Assignment Rules Should Continue to Be Enforced to Protect Consumers.

AT&T claims that "[i]n a competitive market, customers can simply go elsewhere to obtain similar services."[25] As pointed out above, many markets are not effectively competitive, so that customers cannot simply "go elsewhere." Relieving the ILEC of the obligations to follow the Commission's rules in no way protects consumers in such markets.

AT&T again relies on the existence of price caps as protection for consumers by stating, "Existing price cap regulation and competitive forces already provide ample safeguards for the public."[26] Price cap regulation without proper cost assignment as the Commission's rules require is not adequate protection for consumers when the ILECs remain dominant carriers, as discussed above.

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[24] Time Warner at 11-12.

[25] AT&T at 4.

[26] Id. at 5.

The Commission should reject AT&T's argument that price caps and competitive markets are proof that consumers would be protected and therefore ILECs should be freed from the requirement to follow the Commission's cost assignment rules. Price caps do not protect consumers in markets where there is a lack of competitive alternatives.

C. Forbearance from Cost Assignment Rules Would Not Serve the Public Interest.

AT&T claims that "[c]onsistent with the requirements of Section 10(a)(3) of the Act, BellSouth has demonstrated that forbearance from these rules would serve the public interest."[27] AT&T's claim centers on its opinion that carriers will be more efficient, improve service quality, and accelerate innovation and investment if the burdensome cost assignment responsibilities were removed. AT&T claims that the marketplace is distorted because neither cable nor wireless carriers are subject to such rules. This, AT&T claims, is not in the public interest.[28] However, as NASUCA has pointed out in these reply comments and as addressed in the comments of NJDRA and Time Warner, an even larger distortion of the marketplace is caused by the continued dominance of the ILECs. For this reason, the types of rules at issue here are necessary to protect the public interest.

AT&T cites to a Commission order which recognized that forbearance is appropriate if enforcement "would pose significant adverse competitive consequences [on the carrier], without positive benefits for consumers."[29] AT&T fails to recognize, however, that the requirement to follow the Commission's cost assignment rules *does* provide positive benefits to consumers.

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[27] Id. at 6.

[28] See id. at 6-7.

[29] AT&T at 6, citing *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance,* Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶31 (1999).

Such benefits include the ability of federal and state regulators to have the information necessary to ensure just and reasonable rates, to guard against anticompetitive behavior due to market dominance, to continue to set TELRIC rates and determine universal service support, and to adjust price caps periodically, if necessary.

IV. STATES SHOULD NOT BE PREEMPTED IN THEIR ATTEMPTS TO REGULATE CARRIERS IN THEIR JURISDICTIONS.

Verizon recommends that the Commission preempt any state rules that are inconsistent with the Commission's separations rules "to avoid a proliferation of burdensome and unnecessary cost allocation requirements."[30] Verizon goes on to allege that such state rules would "impede competition, and delay or foreclose the introduction of innovative services."[31]

The litany of problems Verizon foresees as a result of conflicting federal and state rules regarding separations leads to the conclusion that both NASUCA and NJDRA reached, that a joint board made up of both federal and state regulators is the appropriate forum for determining a solution that is acceptable to both jurisdictions. Further, in order to preempt state laws or regulation, it must be shown that Congress' preemptive intent is "unmistakably clear."[32]

V. CONCLUSION

The issues raised in BellSouth's Petition should be referred to a federal-state joint board for review and analysis. The joint board should then issue its proposals for comment. Given the approach of the June 1, 2006 separations freeze expiration, these issues should be addressed as

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[30] Verizon at 1.

[31] Id. at 2.

[32] *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); s*ee also State ex rel. Nixon v. Missouri Mun. League*, 541 U.S. 125, 130 (2004); 47 U.S.C. § 152(b).

expeditiously as possible. In addition, as NASUCA, NJDRA, Time Warner and Ad Hoc have demonstrated, cost assignment rules are still important to ensure just, reasonable, and nondiscriminatory rates, to protect consumers, and are consistent with the public interest. Thus, the Commission should deny BellSouth's Petition.

Respectfully submitted,

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